

ard for cream cheese, and "some" manufacturers produce a non-complying product. The implication throughout the respondent's brief is that the petitioners are a minority who are attempting to attack the standard of the industry. The contrary is true. Of the twelve cream cheese manufacturers represented at the hearing, the petitioners constitute eight. Of the remaining four, two (Borden and Fairmont) likewise opposed the proposed standard (fols. 1611, 1970). The only manufacturers supporting the standard are the Kraft Company and the Breakstone Company, both of which are owned by National Dairy Products Corporation. *All* manufacturers make cream cheese which does not comply with the Administrator's standard (Pet. 26), and most of the cream cheese in the market does not comply (Pet. 18-19).

6.

In the same vein the Administrator's brief continually refers to a "high-fat, low-moisture" product and a "low-fat, high-moisture" product without defining what is meant by these terms. In fact, in different places in the brief, it appears that cheeses of different fat and moisture content are intended. For example, reference is made to cream cheese falling within a 35 to 40 percent fat range (ftn. p. 22). The Administrator then states that this traditionally "high-fat, low-moisture" product still constitutes substantially more than one-half of all that is sold as cream cheese, and in support of this important allegation cites only page 226 of the record. An examination of the testimony of the (Kraft) witness found on that page indicates that the witness is not testifying from facts and figures, but is merely expressing his opinion, and that the "butter-fat content on that cheese is running from 33% to 36% fat". With due allowance made for variation of fat content in accordance with the Administrator's findings (Finding 21, R. 1151), any standard of fat in

excess of 31 percent minimum is contrary to the findings, and not based upon the so-called traditional product of cream cheese. The Administrator's brief then refers to the "low-fat, high-moisture" product as constituting somewhere between "one-quarter and one-third of the total volume of cream cheese produced", and cites certain page references from the record. An examination of the said page references establishes that what the witnesses were referring to was the lower grade of hot-pack cream cheese, which the witnesses referred to as the "25 percent butter-fat class" cream cheese. It must be remembered that when the witnesses refer to a "No. 2" cream cheese, or a "low-fat cheese", they refer to this so-called 25 percent class of cream cheese. That on the other hand, when they refer to a "No. 1" cheese or a "high-fat cheese, they refer to cream cheese containing as low as 29% fat (fols. 337, 1224-1226, 1302, 1352,³ 1449-1450, 2144).

The continual implication that a "high-fat, low-moisture" cheese was referred to by the witnesses as a cheese of a minimum of 35 percent fat and a maximum of 55 percent moisture is misleading and is not in accordance with the facts (See record references above). The respondent also states (Adm'r. Br. 16) that manufacturers and distributors distinguish the "low-fat product" by the name "hot-pack". There is not a single record reference to indicate that any manufacturer makes such a distinction. The fact is, as is clear throughout the record, that both the so-called "No. 1" and "No. 2" cream cheese, or "high-fat" and "low-fat" cream cheese, are made by the hot-pack process, as both are made by the cold-pack process. The distinction is not on the basis of the process employed.

(3) The figure 20 percent which appears in the printed record at this point should be 29 percent as in the original record.

7.

The Administrator states (Adm'r. Br. 20) that the limits of 33 percent fat and 55 percent moisture "clearly could not properly have been established by 'picking out the lowest' percentage figure of fat or highest of moisture at which anyone may have made a product sold as cream cheese". The petitioners do not contend that the Administrator should pick the lowest percentages at which any one may have made cream cheese. Petitioners contend that a standard should be fixed bearing a reasonable relation to the practice of the industry as a whole and that the Administrator's order does not do this. On the contrary, the Administrator has taken a figure even higher than the highest fat and moisture standard employed in the industry (Pet. 26).

8.

The respondent states in his brief (pp. 21, 25) that hot-pack cream cheese is being made within the fat and moisture limits prescribed by the standard and can continue to be so made, citing several record references. The pages referred to set forth the testimony of four Kraft witnesses, one Breakstone witness (a subsidiary along with Kraft, of National Dairy Products Corporation), and a Borden witness. An examination of their testimony indicates that the hot-pack cream cheese manufactured by Kraft tests from 52½% to 61% moisture (fol. 651). At the second hearing it was made clear by Mr. Page, who is in charge of production for Kraft, that hot-pack cream cheese of a minimum of 33% fat and a maximum of 55% moisture, is not sold by Kraft in the United States (fol. 1920); that the average test of Kraft hot-pack cream cheese is 29.8% fat and 58% moisture (fols. 1933-1934). Only the Borden Company has recently attempted to introduce to the American market a product of hot-pack

cream cheese which complies with the Administrator's standard, and its experience has been that the product is not salable (fols. 1583-1584).⁴ The reason for this is that "in heating milk solids the heat has the effect to sort of expand the solids" (fol. 1619). As a result of this physical phenomena, while cold pack cream cheese containing 55 percent moisture may be salable cheese, hot pack cream cheese of similar test is too hard and too dry (fols. 1257, 1619, 2145).

9.

Attention should be drawn to the fact that references in the Administrator's brief to the testimony of an "industry witness" usually has reference to a Kraft witness (Adm'r. Br. 11, 26, 27, 28, 29). As stated in the dissenting opinion below, the Kraft Cheese Company was the only manufacturer which did not object to the requirement that a major portion of the product now known as cream cheese be hereafter known as "neufchatel" (R. 1173), a requirement which would promote a monopoly in its favor (Pet. 4).

10.

The Administrator calls the name "neufchatel" "a natural and almost automatic choice" for the product in question, formerly known only as cream cheese (Adm'r. Br. 26). "Natural" and "automatic" to whom? Certainly not to the industry which was uniformly, with one exception, opposed to its adoption (R. 1173). Certainly

(4) At the first hearing the Borden Company supported the Administrator's standard in the belief that they would be able to make hot pack cream cheese within the limitations proposed. Between the first and the second hearings, however, they attempted to put on the market a hot pack cream cheese of such a composition and they found that hot pack cream cheese testing less than 60% moisture was unacceptable as it was too dry and too firm (fols. 1640, 2145). On the basis of such experience the Borden Company changed its former recommendation and recommended a standard of 60% moisture and 28% fat (fol. 1611).

not to the impartial experts who stated that the change of name is not desirable (O. P. Exhibit 9, R. 1046). Certainly not to the consumers who never heard of "neufchatel".

"Neufchatel" cheese was defined and known in 1921 as the product made from milk containing 50 percent fat in its moisture-free substance (Food and Drug Administration, S. R. A. No. 2, Rev. 5). Cream cheese, on the other hand, contains 65 percent fat in its moisture-free substance. All of petitioners' product complies with the latter definition and is and always has been cream cheese and nothing else. The difference in the relationship of fat to solids compels the addition of cream to milk in order to get cream cheese (fols. 1410-1411). This is the basic difference between what was once known as "neufchatel" and cream cheese. All of the petitioners' product is made with the addition of cream. In addition to this difference in the starting material, both Government and industry witnesses testified to differences of appearance, texture, keeping qualities, fat content, method of coagulation, use of gum, pasteurization, homogenization and method of treating the curd (fols. 1556, 1705-1712, 1778, 1864, 2077, 2122). In view of all of these differences which exist between the cream cheese which is being deprived of its common and usual name, and the product which has fallen into disrepute under the name "neufchatel" cheese (Finding 45, R. 1155), it is not surprising that the *Committee on Cheese Quality of the American Dairy Association*, one of whose members is Mr. H. L. Wilson, Government witness, reports that it is against the application of the name "neufchatel" to this product. O. P. Exhibit 9, (R. 1045) which contains a report of this Committee, also contains comments which are pertinent to the question of whether "neufchatel" is an appropriate name for this cheese. In answer to the question

whether this change of name is desirable none of the impartial experts answered in the affirmative, six of the seven said "no", one said "perhaps" (R. 1046).

11.

The Administrator states (Adm'r. Br. 31) that none of the petitioners actually testified that they use water in the manufacture of hot-pack cream cheese. That petitioners do use water for the purposes of adjustment of the fat and moisture content is, however, clear from the testimony and the history of the standards. The originally proposed standard of 1940 (R. 1067-1068) made no provision for the addition of any liquid in the manufacture of hot-pack cream cheese. At the reopened hearing in 1941, the petitioners showed that they must use a liquid in the manufacture of hot-pack cream cheese, and that the liquid added "might" be cream, milk, skim milk, or water, depending upon the curd being worked with (Comford, fol. 1357). See also fol. 1000. It is also clear from the record that petitioner Newark Cheese Company uses water in the manufacture of its hot-pack cream cheese (fols. 1805-1806). Not a single manufacturer, except Borden, testified that he did not use water. In fact, Kraft uses only water (fol. 2184). The Borden Company not only does not use water, but in their particular process does not use any liquid of any kind, whether cream, milk, or skim milk (fols. 1606, 1649). This is due to their particular type of equipment and process, whereby they leave the whey in the curd before applying heat (fols. 1606, 1660). The Administrator has found that a liquid is added at this point (Finding 27, R. 1052), and the Borden practice is the exception and not the rule. The reference in the Administrator's brief (Br. 32) to testimony that it is not good commercial practice to add a liquid, refers to testimony of the Borden witness whose practice is the single excep-

tion in the entire industry. The Administrator's own Finding 27 refutes this statement.

In the only reference in the Administrator's brief to testimony that a good product cannot be made using water (Adm'r. Br. 32), *the witness is not testifying about hot-pack cream cheese, but about cottage cheese and creamed cottage cheese.* The witness, Mr. Perry, testified only with reference to cottage and creamed cottage cheese. The milk companies he represented do not manufacture cream cheese. An examination of the record (fols. 1884-1885) indicates that the witness advocates the addition of cream or milk to cottage cheese in the manufacture of creamed cottage cheese. There is no pertinence whatever in this testimony to the issue here. Since the end product must meet the fat and moisture requirements of the standard, the exclusion of the use of water, without any finding to support such exclusion, is arbitrary.

Conclusion.

It is respectfully submitted that novel and important issues not heretofore raised under the new Food, Drug and Cosmetic Act are involved in this case; that the standards promulgated do not define the product in question by its common and usual name so far as practicable; that they do not promote honesty and fair dealing in the interest of consumers and are arbitrary and unreasonable and not supported by substantial evidence of record; that the importance and scope of the issues herein warrant the granting of this petition.

Respectfully submitted,

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